tion be, and it hereby is, dismissed, that the aforesaid order to cease and desist be, and it hereby is, affirmed and enforced, and that petitioners be, and they hereby are, commanded to obey said order and to comply therewith; and

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that within ninety days after the entry of this decree petitioners shall file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which they have complied with said order to cease and desist.

Without prejudice to the right of the United States, as provided in Section 5(1) of the Federal Trade Commission Act, to prosecute suits to recover civil penalties for violation of the aforesaid order to cease and desist, hereby affirmed and enforced, and without prejudice to the right of the Federal Trade Commission to institute and maintain contempt proceedings for violation of this decree, this Court retains jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof.

By the Court:

William Healy
William E. Orr
Walter L. Pope
United States Circuit Judges.

Date: November 25, 1955.

(Endorsed)
Filed DEC - 9 1955
Paul P. O'Brien,
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Monday, December 12, 1955

Before: HEALY, ORR and POPE, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Petitioners, filed December 5, 1955, and within time allowed by rule of Court for a rehearing of the above cause be, and hereby is denied.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRACTOR TRAINING SERVICE, a corporation, TRACTOR TRAINING SERVICE, INC., a corporation, and JOY E. BADLEY, Petitioners,	)	No. 14,346.
vs.	)	
FEDERAL TRADE COMMISSION, Respondent.	)	

CERTIFICATE OF CLERK, U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 21 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, PAUL P. O'BRIEN, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing eight hundred and thirty-six (836) pages, numbered from and including 1 to and including 836, to be a full, true and correct copy of the entire record, excluding original exhibits, of the above-entitled case in the said Court of Appeals, made pursuant to request of counsel for the Petitioners, and certified under rule 21 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this sixteenth day of January, 1956.

(SEAL)

PAUL P. O'BRIEN
PAUL P. O'BRIEN, Clerk

APPENDIX B

28 U.S.C.A.

Sec. 1254. Courts of appeals; certiorari; appeal; certified questions.

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any civil or criminal case, before or after rendition of judgment or decree;

* * * *

15 U.S.C.A. 45

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause

shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corpoation to cease and desist fom using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the transcript of the record in the proceeding has been filed in a circuit court of appeals of the United States, as herein after provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in the whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Pro-*

vided, however, That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate circuit court of appeals of the United States, in the manner provided in subsection (c) of this section.

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the

public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 240 of the Judicial Code.

(Sept. 26, 1914, c. 311, sec. 5, 38 Stat. 719;
Feb. 13, 1925, c. 229, sec. 2, 43 Stat. 939;
Mar. 21, 1938, c. 49, sec. 3, 52 Stat. 111;
Jan. 23, 1938, c. 601, sec. 1107(f), 52 Stat. 1028;
Jan. 25, 1948, c. 646, sec. 32(a), 62 Stat. 991;
May 24, 1949, c. 139, sec. 127, 63 Stat. 107;
Mar. 16, 1950, c. 61, sec. 4(c), 64 Stat. 21.)

Title 5, U.S.C.A.

Sec. 1004 (Sec. 5, Admin. Pro. Act).

"(c) The same officers who preside at the reception of evidence pursuant to section 1006 of this title shall make the recommended decision or initial decision required by section 1007 of this title except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigating or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigation or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 1007 of this title except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency."

June 11, 1946, c. 324, sec. 5, 60 Stat. 239.

Sec. 1006 (Sec. 7, Admin. Pro. Act).

"(a) There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this chapter; but nothing in this chapter shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 1007 of this title shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case."

"(b) Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 1007 of this title, and (9) take any other action authorized by agency rules consistent with this chapter."

June 11, 1946, c. 324, sec. 7, Stat. 241.

Sec. 1007 (Sec. 8, Admin. Pro. Act).

"(a) In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 1004 of this title, any other officer or officers qualified to preside at hearings pursuant to section 1006 of this title) shall initially decide the case or the agency shall require (in specific cases or by general rule, the entire record to be certified to it for initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires."

June 11, 1946, c. 324, sec. 8, 60 Stat. 242.

"Sec. 1009 (Sec. 10, Admin. Pro. Act). Judicial review of agency action

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

"Rights of review

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"Form and venue of proceedings

(b) The form of proceedings for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

"Acts reviewable

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required

by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

"Relief pending review

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

"Scope of review

(e) So far as necessary to decision and where presented the reviewing court shall decide all revelant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discreion, or otherwise not in accordance with law; (2) contrary to constitutional

right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

June 11, 1946, c. 324, Sec. 10, 60 Stat. 243."

Sec. 1010 (Sec. 11, Admin. Pro. Act).

"Subject to the civil-service and other laws to the extent not inconsistent with this chapter, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 1006 and 1007 of this title, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in ac-

cordance with sections 661-663, 664-669, 670-672, 673 and 674 of this title, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 667 of this title, and the provisions of section 669 of this title, shall not be applicable. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommend legislation, subpena witnesses or records, and pay witness fees as established for the United States courts."

June 11, 1946, c. 324, sec. 11, 60 Stat. 244, amended 1949 Reorg. Plan No. 5, eff. Aug. 19, 1949, 14 F.R. 5227, 63 Stat. 1067.

"Sec. 1011 (Sec. 12, Admin. Pro. Act). Impairment of rights; effect on other laws, separability; subsequent legislation; effective date.

Nothing in this chapter shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this chapter or the application thereof is held invalid, the remainder of this chapter or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this chapter through the

issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this chapter except to the extent that such legislation shall do so expressly. This chapter shall take effect three months after its approval except that sections 1006 and 1007 of this title shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 1010 of this title shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

June 11, 1946, c. 324, Sec. 12, 60 Stat. 244."

FEDERAL TRADE COMMISSION RULES
(Excerpts)

RULE XIV

TRIAL EXAMINERS

All hearings pursuant to formal complaints shall be presided over by the Commission, a member of the Commission, or by a trial examiner appointed by the Commission and duly qualified as an examiner or hearing officer within the meaning of the Administrative Procedure Act. So far as practicable trial examiners shall be assigned to cases in rotation.

Subject to the published rules of the Commission and within its authority, officers presiding at hearings shall have the following powers and duties in all cases to which they are assigned by the Commission, to wit:

(8) To make and file an initial decision as provided by Rule XXII.

RULE XV

HEARINGS IN ADVERSARY PROCEEDINGS

All hearing pursuant to formal complaint shall be public unless otherwise ordered by the Commission, and such hearings shall be subject to the following conditions and requirements:

(d) The trial examiner may withdraw from a case when he deems himself disqualified, or he may be withdrawn by the Commission after timely affidavits alleging

personal bias or other disqualifications have been filed and the matter has been heard by the Commission or by a trial examiner whom it has delegated to investigate and report.

RULE XXII

TRIAL EXAMINER'S INITIAL DECISION IN ADVERSARY PROCEEDINGS

Except where he shall have become unavailable to the Commission, the initial decision in each proceeding shall be made and filed by the trial examiner who presided therein.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 667

TRACTOR TRAINING SERVICE, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. 23-32) is reported in 227 F. 2d 420.

JURISDICTION

The judgment of the court of appeals (Pet. 33-34) was entered on December 8, 1955, and a timely petition for rehearing was denied on December 12, 1955 (Pet. 35). The petition for a

writ of certiorari was filed on February 6, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

After two days of hearings in Washington, D. C. in a Federal Trade Commission administrative proceeding, at which only one witness testified, the examiner adjourned the hearings to reconvene in the midwest and far west. Prior to the next hearing session the Commission, "in the interest of economy," appointed a substitute examiner to conduct further proceedings. At the reconvened hearings, the new examiner offered to hear *de novo* the testimony previously taken in Washington, but petitioners objected. The witness who had testified in Washington then testified further with respect to the same matters. Petitioners make no claim that they were prejudiced by the change in examiners.

The question presented is whether under such circumstances the change in examiners constituted prejudicial error in violation of the Administrative Procedure Act because

1. The examiner who prepared the recommended decision had not presided at the initial hearings in Washington, or

2. The assignment of the second examiner was made in alleged violation of the requirement in Section 11 that examiners be assigned to cases "in rotation so far as practicable."

STATUTES INVOLVED

Section 5(a) of the Federal Trade Commission Act, 38 Stat. 717, as amended, 15 U.S.C. 45, provides in part as follows:

> (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
>
> * * * * *
>
> (6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

The pertinent provisions of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001, *et seq.*, are as follows:

> Sec. 5 * * * (c) * * * The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. * * * [60 Stat. 239-240, 5 U.S.C. 1004(c).]
>
> Sec. 8 * * * (a) * * * In cases in which the agency has not presided at the reception of the evidence, the officer who presided * * * shall initially decide the case or the agency shall require (in specific cases or by general rule) the

entire record to be certified to it for initial decision. * * * [60 Stat. 242, 5 U. S. C. 1007(a).]

Sec. 10 * * * (e) * * * the [reviewing] court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. [60 Stat. 243, 5 U. S. C. 1009(e).]

Sec. 11. Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable * * *. [60 Stat. 244, 5 U. S. C. 1010.]

STATEMENT

On January 18, 1952, the Federal Trade Commission issued a complaint (R. 1-18) charging that petitioners had engaged in unfair and deceptive acts and practices in violation of the Federal Trade Commission Act by making a number of false and misleading representations in connection with the sale of a home study course. After extensive administrative proceedings, the Commission, on March 3, 1954, found that petitioners' practices violated the Act (R. 70-93), and issued a cease-and-desist order (R. 93-95) prohibiting the misrepresentations.

The pertinent facts as found by the Commission are not in dispute, and may be summarized as follows:

Petitioners, two correspondence schools and their principal stockholder and "guiding spirit", sell and distribute through the mails a 46-lesson course on the subject of diesel engines and tractor equipment. The price for the course is $275.00, less certain discounts. During the year 1951 the two schools had an enrollment of 2263. (R. 72-74.)

In connection with the sale of their course, petitioners, in their advertising and through oral statements by their salesmen, have made numerous false and misleading representations. Such misrepresentations have included: (1) that there is a great demand for graduates of the schools as diesel mechanics; (2) that graduates of the course are assured employment; (3) that the students will be given "on-the-job training" for which they will be paid; (4) that the schools provide free "shop training" to graduates; and (5) that the schools' placement service will obtain jobs for graduates at $2.50 or $3.50 per hour or at $75.00 per week and eventually higher wages (R. 81-93). These misrepresentations "have had the capacity and tendency to deceive members of the public" and have induced "the purchase of substantial numbers" of the correspondence courses (R. 92).

The only questions raised by petitioners involve the propriety of the Commission's changing hearing examiners after the hearings had begun. The facts with respect to such change are as follows:

The complaint designated Examiner Cox to conduct the hearings (R. 13-14). He presided at the initial two-day session held in Washington, D. C., on March 10 and 11, 1952 (R. 108-195), at which

only one witness (petitioner Badley, the "guiding spirit" of both schools, R. 74) testified (Pet. 25). At the end of the second day Examiner Cox, after being advised that further hearings would be required outside of Washington, including the Pacific Northwest (R. 191-192), adjourned the hearing to reconvene in Ohio on April 24, 1952 (R. 193).

Prior to the reconvened hearing the Commission, over petitioners' objection (R. 33), substituted Examiner Haycraft for Examiner Cox (R. 32). The Commission stated (R. 34-35) that the substitution was made "in the interest of economy." It appeared that Examiner Haycraft had other hearings in the Pacific Northwest (Pet. 25) but Examiner Cox did not (R. 193). The Commission pointed out (R. 34-35) that the change in examiners would not prejudice petitioners, since they "may properly request the present hearing examiner to strike from the record and retake all or any part of the testimony and other evidence" taken by Examiner Cox.

When the hearing was reconvened before Examiner Haycraft in Ohio, he asked petitioners whether they objected to the "use of the testimony that has already been taken" (R. 195), in which event "the only thing to do then is to require Mr. Bellinger [Commission counsel] to take it over again" (R. 196). Petitioners, renewing their objection to the change in examiners, stated that "[w]e are going to object to starting the proceedings *de novo* and taking this testimony over again * * *" (*ibid.*). However, after pointing out that

the witness who had testified in Washington was not present at the hearing (R. 197), petitioners' counsel suggested that decision on whether the testimony should be retaken be postponed until subsequent hearings scheduled to be held in Portland, Oregon, and the examiner so ruled (R. 197-198).

At the Portland hearing, Examiner Haycraft again asked petitioners whether they wished to retake the testimony given at Washington (R. 429). Petitioners' counsel, on the basis of his "understanding" that his objection to the change in examiners "would not be affected one way or another" by whether the prior transcript was used, stated that "I'm prepared to agree that the transcript of the Washington hearing be used, rather than putting us or the Commission to the expense of going through it again" (*ibid.*).

Mr. Badley, the witness who had testified in Washington, then gave further testimony in Portland which generally repeated his earlier testimony except for identifying exhibits (R. 430-457, 819-822).

On May 1, 1953, Examiner Haycraft filed his initial decision (R. 39-59), holding that petitioners had violated the Act. In affirming that decision, the Commission also reaffirmed its prior action in substituting examiners (R. 66-67). The Commission noted that on two separate occasions Examiner Haycraft had offered to take the Washington testimony again. It stated that in those rare cases where it "clearly appears" that substitution will effect "great saving to the Government" and is

likely to result in only 'slight inconvenience and expense to respondents," it is the Commission's "duty to take the steps required to effect such economy" (R. 67).

The Court of Appeals for the Ninth Circuit unanimously affirmed the Commission's order (Pet. 23-34). The court held that the change of examiners did not violate any provision of the Administrative Procedure Act and "in no way prejudiced petitioners" (Pet. 28). It ruled (1) that the Commission's procedures constituted "full compliance" with the requirement in Section 8(a) of the Act that the initial decision be made by the examiner who presided (Pet. 26), and (2) that Section 11, which requires that examiners be assigned in rotation "so far as practicable," does not require mechanical rotation but gives the Commission reasonable discretion to depart from mechanical rotation "in the interests of economical operation" (Pet. 27-28). It noted that the substitution was made early in the proceedings, that petitioners were "afforded an opportunity to start anew," and that there was "no suggestion" of any intention to deprive petitioners of a fair hearing or that Examiner Haycraft was "biased or incompetent" (*ibid.*).

ARGUMENT

1. Petitioners contend (Pet. 9-12) that the substitution of Examiner Haycraft for Examiner Cox violated the provision of Section 11 of the Administrative Procedure Act that, "so far as practicable," examiners should be appointed in rotation. They

argue that the assignment of Examiner Haycraft was not made in rotation, but for reasons of economy. We submit, however, that the qualification in Section 11 that assignments be made in rotation "so far as practicable" authorizes the Commission to assign an examiner out of rotation where, as here, it appears that such assignment would achieve desirable economies and would cause the respondent only slight inconvenience and expense.

In *Ramspeck* v. *Federal Trial Examiners Conference,* 345 U. S. 128, this Court rejected a similar attempt to construe Section 11 as requiring assignment of examiners by "mechanical rotation" (p. 140).[1] The Court there upheld a rule of the Civil Service Commission which, by authorizing assignment of examiners so as to reflect the difficulty and importance of cases, necessarily permitted their assignment out of rotation. The Court rejected the contention that the rule violated the rotational assignment provision, holding that it represented "an allowable judgment by the Commission as to what was practicable" (*ibid.*).

Similarly, we think that it was an "allowable judgment" as to what was "practicable" for the Commission to have concluded here that interests

[1] The *Ramspeck* case, upon which petitioners also rely (Pet. 11-12), is the only one of the four decisions of this Court that they cite which deals with the question of assignment in rotation. The other three cases cited (*Wong Yang Sung* v. *McGrath,* 339 U.S. 33, *Riss & Company* v. *United States,* 341 U.S. 907, and *United States* v. *Tucker Truck Lines,* 344 U.S. 33) all deal with other provisions of Section 11.

of economy justified assigning Examiner Haycraft to this case out of rotation in order to avoid the substantial added travel expense which the conduct of further hearings by Examiner Cox would have entailed. Examiner Haycraft had other hearings scheduled in the western area, only one witness had testified in Washington, and any possible prejudice to petitioners was avoided by giving them the opportunity to begin the hearing *de novo*. Under such circumstances, the practicalities of the situation justified the Commission in departing from "mechanical rotation."

2. Petitioners further contend (Pet. 13-18) that since Examiner Haycraft did not preside at the two-day hearing session in Washington, his preparation of the initial decision violated Sections 5(c) and 8(a) of the Administraitve Procedure Act. Those Sections require that, except where he is "unavailable" to the agency, the officer who presides at the hearing shall make the recommended or initial decision. The short answer to this contention is that Examiner Haycraft, who prepared the initial decision, did preside at the hearing. Except for the first two days, he conducted the entire proceeding, and he twice offered to rehear the testimony taken on those two days, but petitioners did not wish to do so. Moreover, to whatever extent Examiner Haycraft's initial decision may have turned on his evaluation of witness credibility, it is significant that the witness who testified in Washington also testified before Examiner Haycraft with respect to the same matters, and that Ex-

aminer Haycraft therefore had full opportunity to observe his demeanor on the stand.

The instant case, therefore, is clearly distinguishable from *Gamble-Skogmo* v. *Federal Trade Commission,* 211 F. 2d 106 (C. A. 8), upon which petitioners rely (Pet. 13-14). In *Gamble-Skogmo* the examiner who presided at the hearings retired from Government service before preparing the recommended decision, and that decision was prepared by a substitute examiner who had heard none of the testimony. The court of appeals set aside the Commission's order on the ground that the retirement of the first examiner had not made him "unavailable" within the meaning of Section 5(c), and that the preparation of the initial decision by the recommended examiner was therefore improper. In that case, however, the substitute examiner had specifically denied the respondent's request for a hearing *de novo* and the court of appeals, in setting aside the Commission order, pointed out that since credibility was "a salient factor" in the recommended decision, Section 5(c) required that it be made by an examiner who had seen the witnesses. In the instant case, on the other hand, the examiner who made the initial decision did observe all the witnesses, and he twice offered to begin the proceedings *de novo*—offers which petitioners rejected. Under these circumstances, his preparation of the initial decision was proper. Cf. *National Labor Relations Board* v. *Dixie Shirt Co.,* 176 F. 2d 969 (C. A. 4); see also *National Labor Relations Board* v. *Stocker Mfg. Co.,* 185 F. 2d 451 (C. A. 3).

3. Section 10(e) of the Administrative Procedure Act provides that in judicial review of agency action "due account shall be taken of the rule of prejudicial error." Petitioners make no contention that they were in any way denied a fair hearing, or that Examiner Haycraft was biased. On two occasions they were given an opportunity to have the Washington testimony heard anew, but they refused to do so. Since petitioners were therefore "not actually prejudiced by the conduct or manner of appointment of the examiner" (*United States* v. *Tucker Truck Lines,* 344 U. S. 33, 35), the court of appeals correctly concluded that the rule of prejudicial error required affirmance of the Commission's order.

CONCLUSION

The decision below is correct, there is no conflict of decisions, and no important question is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court
of the United States

TRACTOR TRAINING SERVICE, a corporation, TRACTOR TRAINING SERVICE, INC., a corporation, and JOY E. BADLEY,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

Petition for Reconsideration

Come now the petitioners, and respectfully petition the Court for a reconsideration of its petition for a Writ of Certiorari directed to the United States Court of Appeals for the Ninth Circuit to review its decision affirming an order of the respondent, Federal Trade Commission, upon the following grounds, to-wit:

1. The Supreme Court has held that an administrative agency cannot disregard the provisions of Section 11 of the Administrative Procedure Act because compliance therewith will "cause inconvenience and added expense." *Wong Yang Sung vs. McGrath,* 339 U.S. 33, p. 46; 70 S. Ct. 445, p. 452.

In the instant case the Federal Trade Commission deliberately disregarded the provisions of Section 11 of the Administrative Procedure Act (and several other provisions in addition) when it changed hearing examiners during the proceedings and did so upon the explicit and express ground of inconvenience and expense, and this conduct was approved by the decision of the United States Court of Appeals.

2. The Supreme Court of the United States has held that a litigant who makes a timely demand is entitled to a hearing examiner chosen as the Act provides and that a "defect in the examiner's appointment was an irregularity which would invalidate a resulting order if the Commission had overruled an appropriate objection during the hearing." *U. S. vs. L. A. Tucker Truck Lines*, 344 U.S. 33, pp. 36-38; 73 S. Ct. 67, pp. 68 and 69. (Citing *Riss & Company vs. U. S.*, 341 U.S. 907; 71 S. Ct. 620.)

In the instant case, petitioners made timely and repeated objections to the irregular and illegal procedure followed by the Federal Trade Commission (violations of Sections 7(a) and 11 of the Administrative Procedure Act), all of which were overruled. Yet this conduct by the Commission was approved by the decision of the United States Court of Appeals.

3. The United States Supreme Court has held that Constitutional due process requires that in administrative proceedings "The one who decides must hear," *Morgan vs. U. S.*, 298 U.S. 468, 36 S. Ct. 906 (911). The

Administrative Procedure Act (Secs. 5(c), 7(b) and 8(a)) repeatedly stipulates that the initial decision shall be made by the hearing examiner who heard the case unless he shall have become "unavailable," *Gamble-Skogmola vs. T.C.T.*, 211 F. (2d) 106; *Kuhn vs. C.A.B.*, 183 F. (2d) 839 (Syl. 4); *N.L.R.B. vs. Stoker Co.*, 185 F. (2d) 451 (Syl. 6).

In the instant case the initial decision was made by the substitute examiner who had heard only PART of the case and although the original hearing examiner who had heard the first part of the case was not "unavailable."

* * * * *

The decision of the United States Court of Appeals for the Ninth Circuit in this case, upholding the clear, unequivocal violation of FIVE requirements of the Administrative Procedure Act is in irreconcilable conflict with the herein cited decisions of the United States Supreme Court and the United States Court of Appeals in other Circuits.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

McDANNELL BROWN,
Attorney for Petitioners.

It is hereby certified that the foregoing petition is presented in good faith and not for purposes of delay.

/s/ McDANNELL BROWN,

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